

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-1012

CHRIS HALE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered APRIL 22, 2009

APPEAL FROM THE MARION
COUNTY CIRCUIT COURT,
[NO. CR-2006-82-4]

HONORABLE GORDON WEBB,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Chris Hale appeals his conviction from the Marion County Circuit Court on a charge of theft of property, a Class C felony, for which he was sentenced to a three-year suspended imposition of sentence, together with a \$3,000 fine and court costs, as well as ordered to pay restitution in the amount of \$2,000. On appeal, he challenges the sufficiency of the evidence to support the conviction. We affirm.

Facts

Appellant was an independent contractor who performed work as a heavy-equipment operator for Chris Wade, Sr., and Chris Wade, Jr., at their business, Ozark Realty, from the fall of 2005 through the end of February 2006. He had previously worked with the Wades on construction and road-building projects through his backhoe/dozer service. During the 2005-2006 employment, appellant had asked for and received permission to borrow a steel

flatbed tandem-axle trailer made by Chris Wade, Jr., to haul heavy-engine parts. It was common practice for employees to borrow equipment for their personal use, and appellant had access to and use of all the equipment associated with the business.

Appellant claims to have returned the trailer to Ozark Realty on Saturday, February 10, 2006. He maintains that he and his then girlfriend, Sherry Case, returned it before 8:00 a.m., on their way to take Ms. Case to work. No one was there when he claims to have returned the trailer to the side of the shop where the other trailers were parked. Because he had borrowed and returned equipment on previous occasions without notifying anyone, appellant did not feel the need to inform anyone that he had returned the trailer.

On or about March 3, 2006, Chris Wade, Sr., asked Lindon Marberry, a maintenance worker for the business, to go to appellant's house to pick up the trailer. When Mr. Marberry arrived at appellant's house, he saw what he claims was the trailer in question parked beside appellant's house, but he was unable to retrieve it because it was blocked by a truck. Mr. Marberry made several unsuccessful attempts to contact appellant by telephone. Appellant subsequently returned Mr. Marberry's call, explaining that he had returned the trailer several weeks ago. Appellant provided the same explanation to Chris Wade, Sr., when the two spoke several days later. When Mr. Wade and Mr. Marberry went to the shop to look for the trailer, it was not there. Additionally, when they went back to appellant's house, the trailer previously seen by Mr. Marberry was no longer there. The missing trailer was never recovered.

Appellant was arrested on June 9, 2006, pursuant to a felony information alleging that he had committed the offense of theft of property. He was charged under Arkansas Code Annotated section 5-36-103, a Class B felony, for taking or exercising unauthorized control over the property of another person, with the purpose of depriving the owner thereof, which property had a value in excess of \$2,500 or more. A bench trial was held on April 16, 2008, at which time Mr. Marberry, Chris Wade, Jr., and Chris Wade, Sr., testified for the State. After the State rested, Appellant's counsel moved for a directed verdict, arguing that there was no proof of an unauthorized taking of the property with the intent to deprive the owners. Additionally, appellant's counsel argued that there was insufficient proof submitted as to the value of the trailer to meet the \$2,500 threshold required by the statute. The circuit court denied the motion, finding that sufficient evidence had been presented as to both issues.

Appellant then testified in his own defense, and Ms. Case also testified for the defense. At the close of all the evidence, appellant's counsel rested and renewed the motion for directed verdict on the same basis as the initial motion—but with some additional argument regarding the issue of property valuation. The circuit court denied the renewed motion and ultimately found appellant guilty of Class C felony theft of property, based upon the valuation of the trailer at \$2,000, and imposed the previously set-forth sentence. The judgment and commitment order was filed on May 5, 2008, and appellant filed a timely notice of appeal on May 29, 2008. This appeal followed.

Standard of Review

A motion to dismiss at a bench trial, like a motion for a directed verdict at a jury trial,

is considered a challenge to the sufficiency of the evidence. *Tomboli v. State*, 100 Ark. App. 355, 268 S.W.3d 918 (2007). When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *Id.* Only evidence supporting the verdict will be considered. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.*

Circumstantial evidence may constitute sufficient evidence to support a conviction, but it must exclude every other reasonable hypothesis other than the guilt of the accused. *Tomboli, supra*. The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the finder of fact to decide. *See id.* Credibility determinations are made by the trier of fact, which is free to believe the prosecution's version of events rather than the defendant's. *See Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001).

Discussion

I. Unauthorized Possession

Arkansas Code Annotated section 5-36-103 deals with the offenses of theft of property, and states in pertinent part that,

(a) A person commits theft of property if he or she knowingly:

(1) Takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner of the property;

. . . .

(b) Theft of property is a:

(1) Class B felony if:

(A) The value of the property is two thousand five hundred dollars (\$2,500) or more;

. . . .

(2) Class C felony if:

(A) The value of the property is less than two thousand five hundred dollars (\$2,500) but more than five hundred dollars (\$500)[.]

Appellant argues that in this case, the main evidence is inconsistent circumstantial evidence that does not exclude every reasonable hypothesis consistent with his innocence. He asserts that the evidence is evenly divided between the State's witnesses stating that appellant did not return the trailer and his witnesses stating that he did. He maintains that there is no way that the testimony could lead a reasonable trier of fact to a conclusion beyond suspicion and conjecture.

Appellant reiterates that he was in *authorized* possession of the trailer in question from November 2005 until February 10, 2006. He contends that the only direct evidence presented as to whether he maintained possession of the trailer past that date was provided by Ms. Case, who testified that appellant returned the trailer on February 10, 2006. She was a direct witness, being with him at the time, who testified that she had not seen it in his possession since that date. Even though Mr. Marberry claimed to have seen the trailer at appellant's house at a later date, appellant argues that he cannot prove it was actually the trailer in question.

Appellant also notes that even Chris Wade, Sr., acknowledged that it was possible that appellant had returned the trailer and someone else came and took it without permission, as the trailers are kept unlocked outside. He maintains that all this evidence undeniably created a reasonable doubt that he remained in unauthorized possession of the trailer after February 10, 2006, thereby stealing the trailer in question.

The circuit court specifically credited the testimony of Mr. Marberry, who testified that Chris Wade, Sr., asked him to recover the borrowed trailer from appellant. He explained that he attempted to contact appellant but was unsuccessful. Mr. Marberry testified that he drove to appellant's home on Thursday, March 2, 2006, where he spotted the trailer parked on appellant's property but blocked in by appellant's truck. Because of this, Mr. Marberry was unable to recover the trailer, so he again attempted to contact appellant. When he finally spoke to appellant, appellant told him that the trailer had been returned to the shop; however, Mr. Marberry was then unable to find the trailer at the shop.

Subsequently, he and Chris Wade, Sr., returned to appellant's property on the following Monday, March 6, 2006, and the trailer had been moved from that location as well, and it was never recovered. After failing to locate the missing trailer, Mr. Marberry and the Wades reported its disappearance to the local sheriff, but it was never found. Importantly, Mr. Marberry specifically testified that he could not have confused the missing trailer with another trailer because it was unique, having been custom built by Chris Wade, Jr.

Chris Wade, Jr., testified as to his long-standing friendship with appellant, acknowledging that he had loaned the trailer to appellant sometime in November 2005.

Chris Wade, Jr., testified that when he discovered that his father was searching for the trailer, he promised to recover it from appellant. However, when he spoke to appellant, appellant assured him that he had returned the trailer to the shop a week earlier and parked it on the south side of the office building. Chris Wade, Jr., then explained that he searched for the trailer in the location indicated by appellant, but did not find it there. Additionally, he indicated that he had not seen the trailer in the vicinity of the shop since he loaned it to appellant. Finally, he indicated that no other equipment or trailers had been stolen from the property.

Viewing all the evidence in the light most favorable to the State, the testimony of the State's witnesses was sufficient to establish that appellant took the trailer from the owners' property in November 2005 and, while that initial possession may have been permissive, it evolved into a theft of property when he failed to return it to them when asked. Mr. Marberry's testimony supported that he was familiar with the trailer and its unique characteristics. Additionally, he insisted that it could not be confused with another trailer. His testimony put the trailer in appellant's possession on March 2, 2006, when he claimed to have seen it on the property, which was several weeks after appellant claimed to have returned it.

Appellant's credibility was discredited by the contradictory testimony offered by Mr. Marberry and Chris Wade, Jr. The circuit court was clearly free to believe the testimony of the State's witnesses as opposed to appellant's self-serving testimony, which was supported only by the testimony of his ex-girlfriend, Ms. Case. *See Brown v. State*, 374 Ark. 341, __

S.W.3d __ (2008). The State asserts, and we agree, that substantial evidence supports the circuit court's conclusion that appellant was in possession of the trailer during the relevant time frame and exercised unauthorized control over the property by disposing of it after learning that the owners were seeking its return.

II. Valuation of Trailer

Appellant strongly urges that the State failed to prove beyond a reasonable doubt that the value of the trailer was \$2,500 or more as required by the statute. He points out that the statute defines "value" as the market value of the property *at the time of the offense*. See Ark. Code Ann. § 5-36-101(11)(A)(i). (Emphasis added.) He cites *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998), for the proposition that testimony by the owner of the property as to its value is not conclusive. The preferred method of establishing the value of property is through expert witness testimony rather than from the owner. *Id.*

He relies upon *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981), stating that if the opinion given as to the value of the property is based upon someone else's appraisal or is merely a guess as to the value of the property, it is not considered to be substantial evidence. *Id.* In the *Hughes* case, a witness was asked to state the value of the hubcaps stolen from her vehicle. The court would not allow her to state what the appraisal had been because it would be hearsay; accordingly, she had to make a guess as to the value based upon her own knowledge. It was determined that because the only evidence presented as to the value of the hubcaps was her guess, the State failed to meet its burden of proof regarding value.

In the instant case, appellant argues that the only evidence offered by the State as to the value of the trailer was hearsay evidence from Chris Wade, Jr., regarding a quote he received a year prior and a guess as to the value of the trailer from Chris Wade, Sr. He maintains that is not sufficient to support the verdict.

The evidence relied upon by the circuit court in making its valuation is as follows: (1) The trailer was a heavy tongue, short tandem, with wooden floors, chrome razor rims, and short rails; (2) The trailer was a multipurpose trailer that Chris Wade, Jr., built in a high-school welding class in 1994; (3) The trailer was a tandem-axle trailer truck made of steel; (4) If the trailer were to be rebuilt now, it would cost a couple of thousand dollars in materials and the time and labor to build it; (5) When Chris Wade, Jr., was going to have a similar trailer built a year prior to trial, he received a quote of \$2,500; (6) Chris Wade, Sr., opined that it would probably cost \$3,500 to rebuild the trailer, but he never obtained any estimates from anyone as a basis for that number; (7) A commercial-property schedule from 2006 for the Wades' business property indicates a flat-bed trailer on the last line with an assessed value of \$180.

Appellant reiterates that the statute states that the market value of the property at the time of the offense is the amount that matters to determine the level of criminal liability, rather than the replacement value of the property. Here, there is no evidence of an original purchase price for the trailer, as Chris Wade, Jr., built it as a high-school shop-class project. Additionally, he claims that replacement value of \$3,500 opined to by Chris Wade, Sr., is far

less trustworthy than his son's replacement estimate of \$2,500 because Chris Wade, Jr., actually went out and obtained an independent quote upon which he relied.

Appellant indicates that the trailer was built in 1994. Even assuming that it was worth \$2,500 then—purely for the sake of argument because no one testified as to its original value or the value at the time of the alleged theft—appellant correctly surmises that the trailer would not have maintained its full value over the course of more than a dozen years of use. The quote for a new, similar trailer obtained approximately a year prior to trial was \$2,500. Appellant urges that there is no way a purchaser would pay that same amount for a used 1994 trailer with a good bit of wear on it when he could buy a new, similar trailer for the same price. The used trailer would be valued significantly less; however, he maintains that even if it was reasonably valued at one dollar less than the new trailer, a directed verdict on the question of value would have been appropriate.

We disagree. Initially, we note that the circuit court did not convict appellant of Class B felony theft of property, but rather convicted him of Class C felony theft of property based upon its conclusion that the missing trailer was worth \$2,000. Additionally, appellant failed to object to the admission of any of the testimony that he deems hearsay and, therefore, has waived that particular point for purposes of the appeal. *See Burford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006) (holding that parties are bound by the scope and nature of objections raised below). In order to preserve a point on appeal, a proper objection must be asserted at the first opportunity after the matter to which the objection has been made occurs. *Dickerson v. State*, 363 Ark. 437, 214 S.W.3d 811 (2005). Where a party fails to object to the

competency of an owner's testimony, the testimony is entitled to be considered by the fact finder and its credibility will not be weighed on appeal. *See Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990) (holding that a victim's testimony established her property's cumulative value because her testimony as to its purchase price, replacement cost, and value was admitted without objection—thereby constituting credible evidence).

For clarification, the State fleshes out the relevant section of Arkansas Code Annotated section 5-36-101(12)(A)(i), filling in the portion that appellant left out, which reads, “or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense.” While acknowledging that the preferred method of valuation is by expert testimony, *see Reed v. State*, 353 Ark. 22, 109 S.W.3d 665 (2003), the State correctly indicates that expert testimony is not essential to demonstrate property value. *Id.* It is well settled that an owner of property is competent to testify about the value of his own property. *See Sullivan, supra.*

Under Rule 701 of the Arkansas Rules of Evidence, a layperson is allowed to offer an opinion with respect to the value of stolen property, if it is based upon his own knowledge and experience. *See Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989). Viewing the evidence in the light most favorable to the State, we hold that the testimony presented supports the circuit court's valuation of the missing trailer. As the State indicates, the owners and builder of the trailer are qualified to provide testimony concerning its value because they built it and/or knew the quality of materials and degree of labor necessary for its production. Moreover, there was testimony from the owners regarding the numerous trailers purchased

during their careers. The relevant statute specifically allows for replacement cost to be taken into consideration in the evaluation of the cost of the stolen property, so the testimony regarding quotes on replacement cost for purchase or production was proper for consideration by the circuit court. The competency and credibility of all the testimony before the circuit court was a matter properly decided by the finder of fact. Accordingly, we affirm.

Affirmed.

HART and KINARD, JJ., agree.